

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

DAVID C. GANNON,

Plaintiff,

vs.

JOHN E. POTTER, Postmaster
General, U.S. Postal Service

Defendant.

No. C 05-2299 SBA

ORDER

[Docket Nos. 47, 51]

This case comes before the Court on Defendant John Potter's Motion for Summary Judgment. For the reasons stated below, the Court GRANTS Defendant's motion.

BACKGROUND

Plaintiff David Gannon, a white male, is a window clerk at a post office in Elk Grove, California. First Amended Complaint (FAC) at ¶3. Before November, 1995, Gannon was a Manager of Distribution and Operations at the Postal Service's West Sacramento Processing and Distribution Center. *Id.* at ¶¶20-22. How Gannon became a window clerk after being a supervisor is the subject of this lawsuit.

While Gannon was a manager, he supervised an employee named Ray Bastian. FAC at ¶9. On October 16, 1995, Gannon placed Bastian on restricted sick leave, meaning that Bastian could no longer take sick leave without a doctor's note. Martikan Decl., Exhibit A at 58-59 and Exhibit F. Two days later, on October 18, 1995, Gannon took Bastian off of restricted sick leave after a conversation in which Gannon told Bastian that he was taking Bastian off of restricted sick leave and then immediately asked Bastian to drive a mentally disabled employee named Joe Enos to work. *Id.* at 82; Exhibit G. Bastian understood Gannon's statement as proposing a *quid pro quo*: Gannon would take Bastian off of

1 restricted sick leave if Bastian would drive Enos to work. *Id.*, Exhibit K at 17. Bastian felt that he was
2 placed in a compromising situation. *Id.* A white male postal employee named Bill Dolan complained
3 to management that Gannon had taken Bastian off of restricted sick leave as a *quid pro quo* for Bastian's
4 agreement to drive Joe Enos to work. *Id.*, Exhibit A at 72-73.

5 Dolan's complaint about Gannon was first investigated by James Taylor, who was in Human
6 Resources at the time. *Id.* at 14; Exhibit C at 1. Taylor is also a white male. *Id.*, Exhibit B at 2. Taylor
7 prepared a memorandum for Bob Williamson, who was the West Sacramento plant manager at the time,
8 summarizing his investigation. *Id.*, Exhibit A at 71 and Exhibit H. In the memo, Taylor noted that
9 Gannon admitted that he had told Bastian that he would take Bastian off of restricted sick leave if
10 Bastian would drive Enos to work, but that Gannon said that he was just "joking." *Id.* at Exhibit H.
11 Taylor concluded that Gannons' behavior was "clearly beyond the bounds of acceptable management
12 practices" and unethical. *Id.* at Exhibit H.

13 Williamson reviewed Taylor's memo and concluded that Taylor's investigation supported the
14 charge that Gannon had misused his authority by trading corrective action against a subordinate in
15 exchange for personal services. Martikan Decl., Exhibit D at 1. Williamson also found that Gannon
16 had falsified employee Joe Enos' time card. *Id.* Williamson forwarded Taylor's memo to Frank
17 Jackson, an African-American man who was Gannon's supervisor at the time, for review and
18 appropriate action. *Id.* at 1-2. Jackson issued Gannon a Notice of Proposed Removal in November,
19 1995. *Id.* at 2. On November 30, 1995, Gannon and his representative at the time – John Garrard – met
20 with Williamson and Taylor to discuss the Notice of Proposed Removal. Martikan Decl., Exhibit A at
21 25; Exhibit D at 2. Marilyn Walton, who was the State Board President of the National Association of
22 Postal Supervisors, also attended the meeting. Martikan Decl., Exhibit E at 10-11. Jackson was not at
23 the meeting. *Id.*, Exhibit A at 27.

24 During the meeting, Taylor offered Gannon the opportunity to return to a "craft" position at the
25 post office of his choice, meaning that Gannon would lose his supervisory position and become a
26 window clerk, to avoid removal. *Id.* at 29-30. Gannon left the room to discuss the offer with Garrard
27 and Walton. *Id.* at 30. When they returned, Gannon accepted the offer. *Id.* at 31. Gannon signed and
28 dated a routing slip stating the following:

I hereby request voluntarily to return to craft. I desire an assignment in the South Area with a guarantee of 40 hours per week.

Id. at 92 and Exhibit I. Gannon returned to work as a window clerk on December 21, 1995. *Id.* at 96. While the Postal Service was investigating Gannon's misconduct, he was placed on administrative leave with full supervisor's pay. *Id.* at 94.

Gannon challenged his demotion before the Merit Systems Protection Board (MSPB). FAC at ¶5. After a hearing on the merits, the MSPB rejected Gannon's claim. *Id.* Gannon appealed to the full Board of the MSPB, which also rejected his claim. *Id.* Gannon's First Amended Complaint did not challenge the MSPB's ruling on his non-discrimination claim; it only included a Title VII race discrimination claim. However, during the hearing on the instant summary judgment motion, and in a supplemental brief filed thereafter, Gannon claimed that he was appealing the MSPB's ruling on both his discrimination and non-discrimination claims. *See* Plaintiff's Supplemental Brief at 4-5.

Gannon initially included a retaliation claim in his complaint, but this Court dismissed that claim in a December 14, 2005 Order.

LEGAL STANDARD

A. Summary Judgment

Under Federal Rule of Civil Procedure 56, a court may properly grant a motion for summary judgment if the pleadings and materials demonstrate that there is "no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). A dispute about a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Summary judgment may be granted in favor of a defendant on an ultimate issue of fact where the defendant carries its burden of "pointing out to the district court that there is an absence of evidence to support the nonmoving party's case." *Celotex*, 477 U.S. at 325; *see Johnston v. IVAC Corp.*, 885 F.2d 1574, 1577 (Fed. Cir. 1989).

To withstand a motion for summary judgment, the non-movant must show that there are genuine factual issues which can only be resolved by the trier of fact. *Anderson*, 477 U.S. at 250. The nonmoving party may not rely on the pleadings but must present specific facts creating a

1 genuine issue of material fact. *T.W. Elec. Serv. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626,
2 630 (9th Cir. 1987). The court's function, however, is not to make credibility determinations.
3 *Anderson*, 477 U.S. at 249. The inferences to be drawn from the facts must be viewed in a light
4 most favorable to the party opposing the motion. *T.W. Elec. Serv.*, 809 F.2d at 631.

5 "In evaluating motions for summary judgment in the context of employment discrimination,
6 we have emphasized the importance of zealously guarding an employee's right to a full trial, since
7 discrimination claims are frequently difficult to prove without a full airing of the evidence and an
8 opportunity to evaluate the credibility of the witnesses." *McGinest v. GTE Serv. Corp.*, 360 F.3d
9 1103, 1112 (9th Cir. 2004).

10 **B. Title VII**

11 The sole remaining issue in this lawsuit is whether Gannon was discriminated against on the
12 basis of race, in violation of Title VII. Title VII makes it illegal for an employer "to fail or refuse to
13 hire or to discharge any individual, or otherwise to discriminate against any individual with respect
14 to his compensation, terms, conditions or privileges of employment because of such individual's
15 race, color, religion, sex or national origin[.]" 42 U.S.C. § 2000e-2(a)(1).

16 "Under Title VII, an individual suffers disparate treatment when he or she is singled out and
17 treated less favorably than others similarly situated on account of race." *McGinest v. GTE Service*
18 *Corp.*, 360 F.3d 1103, 1121 (9th Cir. 2004). "The plaintiff in a disparate treatment case must show
19 the employer's intent to discriminate, but intent may be inferred from circumstantial evidence." *Id.*
20 at 1122.

21 The plaintiff has the burden of establishing a prima facie case of discrimination. If that is
22 accomplished, "then the burden shifts to the defendant to articulate a legitimate, nondiscriminatory
23 reason for its allegedly discriminatory conduct. If the defendant provides such a reason, the burden
24 shifts back to the plaintiff to show that the employer's reason is a pretext for discrimination."
25 *Vasquez v. County of Los Angeles*, 349 F.3d 634, 640 (9th Cir.2003).

26 To establish a prima facie case, the plaintiff "must offer evidence that 'gives rise to an
27 inference of unlawful discrimination,'" either through the framework set forth in *McDonnell Douglas*
28 *Corp. v. Green*, 411 U.S. 792 (1981), or with direct or circumstantial evidence of discriminatory

1 intent. *Id.* (quoting *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981)). Under
 2 the *McDonnell Douglas* framework, unlawful discrimination is presumed if the plaintiff can show
 3 that: (1) he belongs to a protected class; (2) he was performing according to his employer's
 4 legitimate expectations; (3) he suffered an adverse employment action; and (4) other employees with
 5 qualifications similar to his own were treated more favorably.³ Once the defendant produces
 6 evidence of a legitimate non-discriminatory reason for its actions, the *McDonnell Douglas*
 7 "presumption of discrimination drops out of the picture." *McGinest*, 360 F.3d at 1123 (quoting
 8 *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 143 (2000)).

9 DISCUSSION

10 Defendant's first argument in support of his Motion for Summary Judgment is that Plaintiff
 11 cannot make out a prima facie case of race discrimination because he never suffered an adverse
 12 employment action. Defendant argues that Gannon voluntarily took a demotion to a lower paid
 13 position in exchange for the Post Office's decision not to pursue the Removal Action against him.
 14 As the demotion was voluntary, the demotion cannot constitute an "adverse employment action" for
 15 the purpose of establishing a prima facie showing of discrimination under the third prong of the
 16 *McDonnell Douglas* test. Plaintiff responds that he suffered an adverse employment action in the
 17 form of: (1) a removal; (2) a suspension; (3) a reduction in grade; and (4) a reduction in pay. The
 18 facts demonstrate that Plaintiff in fact received a Notice of Proposed Removal, a Paid
 19 Administrative Leave during the pendency of an investigation, and a Demotion.

20 **A. The Notice of Proposed Removal.**

21 Defendant correctly argues that the Notice of Proposed Removal was only an intermediate
 22 step in the removal process and therefore did not constitute an "adverse employment action."
 23 Several district courts have held that a Notice of Proposed Removal is not an adverse employment
 24 action for purposes of a Title VII claim, because it is not sufficiently final, and because it is subject
 25 to modification by an employer following an appeal. In *Niimi-Montalbo v. White*, 243 F.Supp.2d
 26

27 ¹The Court confirmed at the hearing on this Motion for Summary Judgment that Plaintiff is
 28 pursuing his claim under the *McDonnell Douglas* framework. Both parties conceded that the primary
 issue in this case is whether Defendant suffered an adverse employment action.

1 1109, 1128 (D. Haw. 2003), the district court held that under Ninth Circuit law, a Notice of
 2 Proposed Removal issued to an employee by the Army Corps of Engineers was not an adverse
 3 employment action because the employee's right to appeal the Notice made it insufficiently final.
 4 *Id.* The district court discussed the Ninth Circuit's decision in *Brooks v. City of San Mateo*, 229
 5 F.3d 917, 930 (9th Cir. 2000), in which the Ninth Circuit held that an employment decision that
 6 could be changed on appeal was not sufficiently final to constitute an adverse employment action.
 7 *Id.* ("Because the [negative performance] evaluation could well have been changed on appeal, it was
 8 not sufficiently final to constitute an adverse employment action.").

9 The Notice of Proposed Removal that Gannon received in this case, like the Notice of
 10 Proposed Removal in *Niimi-Montalbo* and the job evaluation in *Brooks*, was subject to appeal.
 11 Martikan Decl., Exhibit J at 2. The Notice says so on its face. *Id.* Indeed, Gannon did appeal the
 12 Notice of Proposed Removal to the plant manager, Bob Williamson. *Id.*, Exhibit L. The facts in this
 13 case are also similar to those addressed by the Ninth Circuit in *Brooks*. The plaintiff in *Brooks*
 14 received a negative job evaluation, appealed the evaluation, and then abandoned her job while the
 15 appeal was pending. *Id.* Here, Gannon received a Notice of Proposed Removal, appealed it to the
 16 plant manager, and then accepted a demotion while the appeal was pending.

17 Other district courts have held that a Notice of Proposed Removal is not an adverse
 18 employment action. In *Hardy v. Potter*, 191 F.Supp.2d 873, 883 (E.D. Mich. 2002), a district court
 19 held that a Postal Service Notice of Proposed Removal was not an adverse employment action
 20 because it "was essentially a warning letter to Plaintiff." *Id.* And in *Boykin v. England*, 2003 WL
 21 21788953, *5 (D.D.C. 2003), the district court held that a Notice of Proposed Removal was not an
 22 adverse employment action because it "was essentially a precursor to the . . . Decision to Remove."
 23 Thus, the Notice of Proposed Removal was an "interlocutory or mediate decision" that had no effect
 24 on the employment conditions. *Id.* (quoting *Page v. Bolger*, 645 F.2d 227, 233 (4th Cir. 1981) (*en*
 25 *banc*)).

26 **B. Paid Administrative Leave.**

27 During the investigation into his misconduct, Gannon was placed on paid administrative
 28 leave. Martikan Decl., Exhibit A at 94. Defendant argues that placing Gannon on paid

1 administrative leave during the course of the investigation does not constitute an adverse
2 employment action. Gannon did not challenge this argument in his Opposition.

3 Persuasive authority supports Defendant's argument. A district court in this District has held
4 that being placed on paid administrative leave is not an adverse employment action, because it does
5 not deprive a plaintiff of any term, condition or benefit of employment. *Tomczak v. Safeway, Inc.*,
6 1997 WL 564049, *5 (N.D. Cal. 1997). Also, the Second Circuit held that placing an employee on
7 paid administrative leave during an investigation is not an adverse employment action. *Joseph v.*
8 *Leavitt*, 465 F.3d 87, 91 (2d Cir. 2006) ("We therefore hold that Joseph's placement on
9 administrative leave pending the criminal charges against him did not constitute an adverse
10 employment action.").

11 As the Second Circuit noted, four other Circuits have reached this result: the Eighth, Sixth,
12 Fifth, and Fourth Circuits. *Id.* (collecting cases). The Federal Circuit is also in accord. *Haddon v.*
13 *Executive Residence at the White House*, 313 F.3d 1352, 1363 (Fed. Cir. 2002). Accordingly, the
14 Court holds that Gannon suffered no adverse employment action when he was placed on paid
15 administrative leave.

16 **C. Gannon Voluntarily Requested A Demotion Rather Than Face Removal.**

17 Next, Defendant argues that Gannon's demotion, resulting in the reduction in both pay and
18 grade, was voluntary. Plaintiff responds that whether Gannon's decision to accept the demotion was
19 voluntary is disputed, but does not provide a factual or legal basis to support this assertion.

20 The Court finds that Gannon's demotion from supervisor to window clerk does not constitute
21 an adverse employment action because he requested the demotion voluntarily in exchange for the
22 Postal Service's rescission of the Notice of Proposed Removal. Gannon has testified that after
23 receiving the Notice of Proposed Removal, he and his representatives met with Bob Williamson, the
24 plant manager, and James Taylor, from Human Resources, to contest the Notice. Martikan Decl.,
25 Exhibit A at 25. During that meeting, Taylor offered to rescind the Notice of Proposed Removal if
26 Gannon would accept a demotion to window clerk at the post office of his choice. Gannon
27 discussed the offer with his representatives in another room, and decided to accept the offer. As
28 evidence of his acceptance, Gannon signed and dated a document stating the following:

I hereby request voluntarily to return to craft. I desire an assignment in the South Area with a guarantee of 40 hours per week.

Id. at 92 and Exhibit I. Gannon's own representative, John Garrard, testified that Gannon never told him that he felt coerced into signing this document. Martikan Decl., Exhibit M.

D. The MSPB Correctly Found That Gannon's Demotion Was Voluntary.

During the hearing on the instant motion, Gannon informed the Court that he intended to petition for review of the MSPB's decision on the voluntariness of his demotion, under 5 U.S.C. §7703(b)(2), as well as the MSPB's decision on his race discrimination claim. This position is contrary to Gannon's First Amended Complaint, which does not seek review of the MSPB's decision on Gannon's non-discrimination claim.

Gannon brought a "mixed case" before the MSPB, meaning that he raised both a discrimination claim under Title VII, and a non-discrimination claim under the Civil Service Reform Act (CSRA). FAC at ¶7. In the context of his non-discrimination claim under the CSRA, Gannon fully litigated the issue of whether his demotion to a craft position was voluntary before the MSPB. AR000312. The full administrative record of the MSPB proceedings, and the final decision, have been filed with this Court.

1. Nature of the MSPB's Jurisdiction.

The MSPB is charged with overseeing and protecting the merit system, and adjudicating conflicts between Federal employees and employers. *Sloan v. West*, 140 F.3d 1255, 1259 (9th Cir. 1998). The MSPB is authorized to review "adverse employment actions," such as removals, suspensions exceeding 14 days, reductions in grade, reductions in pay, or furloughs for fewer than 30 days. 5 U.S.C. § 7512(1)-(5).

The MSPB also has jurisdiction over Title VII discrimination claims if they are brought in conjunction with non-discrimination adverse employment action claims. *Sloan*, 140 F.3d at 1259. Cases brought before the MSPB that assert both discrimination and non-discrimination claims are called "mixed cases," and if the MSPB determines that it has jurisdiction over them, they are called "mixed case appeals." *Id.* If the MSPB decides a mixed case appeal against the employee, then the employee may challenge both the discrimination and non-discrimination aspects of the

1 MSPB's opinion in federal district court. 29 C.F.R. § 1614.310(b).

2 Although the district court has jurisdiction to review both the employee's discrimination and
3 non-discrimination claims, the scope of the district court's review varies based on the type of claim
4 before it. The district court reviews the discrimination claim *de novo*, without any regard to the
5 MSPB's decision. However, the district court reviews the non-discrimination claim as an appeal of
6 the MSPB's administrative decision, meaning that the district court defers to the MSPB's factual
7 findings and reviews for abuse of discretion. *Romain v. Shear*, 799 F.2d 1416, 1421 (9th Cir. 1986).

8
9 **2. Standard of Review for the MSPB's Decision on a Non-Discrimination Claim.**

10 The Ninth Circuit has held that an MSPB decision on a non-discrimination adverse
11 employment action claim is not subject to *de novo* review. *Romain*, 799 F.2d at 1421. Rather, in a
12 mixed case, the Court reviews the MSPB's decision on the Army's personnel action under a "more
13 deferential statutory standard" than the discrimination claim. *Washington v. Garrett*, 10 F.3d 1421,
14 1428 (9th Cir. 1994). The Court will uphold the MSPB's decision unless it was arbitrary and
15 capricious, an abuse of discretion, or unsupported by substantial evidence. *Id.*

16 Thus, the MSPB's decision that Gannon failed to state a *prima facie* case that he was subject
17 to an adverse employment action because he could not show that his demotion was not voluntary is
18 subject to review for abuse of discretion. And Gannon has not shown that the MSPB's factual
19 findings, including its finding that Gannon's testimony was not credible, were arbitrary and
20 capricious. Notably, the Ninth Circuit has held that an MSPB judge's determination of a witness's
21 credibility is entitled to considerable deference. *Washington*, 10 F.3d at 1430.

22 **3. The MSPB Did Not Abuse Its Discretion.**

23 Gannon has failed to show how the MSPB abused its discretion in deciding that Gannon's
24 demotion was voluntary. The MSPB administrative judge heard testimony, reviewed documentary
25 evidence, and assessed the credibility of witnesses. The administrative record shows that Gannon
26 had a full and fair opportunity to litigate the issue. In a lengthy opinion that discusses the testimony
27 in detail, the MSPB administrative judge found that Gannon was not a credible witness (AR000325),
28 that the Postal Service had ample grounds for proposing discipline against Gannon (AR000324), and

1 that Gannon could not show that he was subject to duress or coercion when he agreed to accept a
2 demotion in exchange for the rescission of the notice of proposed removal that had been issued to
3 him (AR000328-30). Because Gannon cannot show that the MSPB abused its discretion in reaching
4 this conclusion, this Court upholds the MSPB's determination that Gannon did not suffer an adverse
5 employment action because his demotion was voluntary.

6 **III. The Postal Service's Legitimate Basis for Proposed Discipline.**

7 Even if Gannon were able to establish a *prima facie* case of race discrimination, the Postal
8 Service has shown a legitimate non-discriminatory reason for proposing that he be removed.

9 A Postal Service investigation (conducted by a white male employee) uncovered evidence
10 that Gannon had misused his authority by coercing a subordinate to run a personal errand in
11 exchange for his removal from restricted sick leave. Martikan Decl., Exhibits D and H. Gannon
12 disputes this, but admits that he took Ray Bastian off of sick leave and also asked him to drive
13 another employee to work during the same "10-second" conversation. *Id.*, Exhibit A at 82. Ray
14 Bastian has testified that he understood that a *quid pro quo* was intended. Martikan Decl., Exhibit K
15 at 17. Misuse of supervisory authority is a violation of Postal Service regulations that would
16 reasonably subject Gannon to discipline. *Id.*, Exhibit J at 2.

17 **IV. Gannon's Evidence of Pretext.**

18 Because the Postal Service has articulated a legitimate, non-discriminatory reason for
19 proposing that Gannon be removed, the burden of proof shifts back to Gannon to show that the
20 Postal Service's stated reason for the discipline was a pretext for discrimination. *Vasquez*, 349 F.3d
21 at 641. To meet this burden, Gannon argues that Frank Jackson – the Postal employee who issued
22 Gannon the Notice of Proposed Removal – conducted an insufficient investigation, because he could
23 not remember what happened to his notes from various interviews (that were conducted 11 years
24 ago), and because Jackson had never observed Gannon engage in misconduct. Gannon's Brief at 15.
25 Gannon also notes that Jackson had issued Notices of Proposed Removal to other Caucasian Postal
26 employees. *Id.*

27 Gannon's first two arguments – that Jackson could not remember what had happened to his
28 interview notes, and that Jackson did not personally observe Gannon engage in misconduct – do not

1 establish pretext. Indeed, they do not even address the legitimacy of the Postal Service's reason for
2 proposing discipline against Gannon. The arguments are also irrelevant because James Taylor – like
3 Gannon, a white man – investigated Gannon himself and found reason for discipline. Martikan
4 Decl., Exhibit C at 1 and Exhibit H. It was Taylor, not Jackson, who offered Gannon a demotion in
5 exchange for the Postal Service's rescission of the Notice of Proposed Removal. *Id.*, Exhibit A at
6 29-30. Jackson was not even present at that meeting. *Id.* at 27.

7 Gannon's third argument – that Jackson had issued Notices of Proposed Removal to other
8 Caucasian employees – misstates Jackson's deposition testimony. In fact, Jackson testified that he
9 could not remember the races of all of the employees to whom he had issued Notices of Proposed
10 Removal, but that he remembered at least two African-American managers who were demoted from
11 Gannon's facility at around the same time that Gannon accepted his demotion. Dryovage Decl.,
12 Exhibit 1 at 48:21-49:1; 50:3-19.

13 The Court finds that Gannon has failed to produce evidence that would raise an issue of
14 material fact regarding whether the Postal Service's stated reason for proposing discipline against
15 him was a pretext for race discrimination.

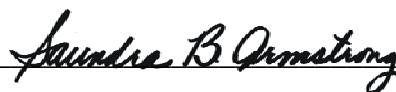
16 CONCLUSION

17 Gannon has failed to establish a prima facie case of race discrimination, because he cannot
18 show that he suffered an adverse employment action. He has also failed to raise a disputed question
19 of material fact regarding whether the Postal Service's stated reason for proposing discipline against
20 him was a pretext for race discrimination.

21 Therefore, IT IS HEREBY ORDERED THAT Defendant's Motion for Summary Judgment is
22 GRANTED. The clerk shall close the file and terminate all pending matters, including the pre-trial
23 conference and trial.

24 IT IS SO ORDERED.

25
26 DATED: 11/28/06



HON. SAUNDRA B. ARMSTRONG
United States District Judge